

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-217171

DATE: May 28, 1985

MATTER OF: Albert R. Brister - Claim for Backpay and
Restoration of Leave

DIGEST:

An employee was placed on involuntary leave on the basis of medical evidence provided by his own physician and the results of a fitness-for-duty examination, pending a determination by OPM on an agency-filed disability retirement application. OPM determined that the employee was not eligible for disability retirement but the agency failed to return the employee to duty until four months later. The employee is entitled to backpay and restoration of leave for the period of involuntary leave subsequent to OPM's determination since the agency was required at that point to either return the employee to duty or initiate his separation on the grounds of disability. The employee's claim for the period prior to OPM's determination may not be allowed since the agency reasonably interpreted the medical evidence presented as indicating the employee's incapacity to perform his duties and OPM did not overturn that evidence.

This decision is in response to an appeal by Mr. Albert R. Brister from our Claims Group's settlement Z-2846382 of January 27, 1984, by which his claim for backpay and restoration of leave was denied in part and allowed in part. For the reasons set forth below, we sustain the Claims Group settlement.

BACKGROUND

Mr. Brister, an employee with the Department of the Army at Fort Polk, Louisiana, was involuntarily placed on leave on April 21, 1980, and an agency-initiated request for

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his disability retirement was submitted to the Office of Personnel Management (OPM) on June 2, 1980. By a letter dated August 10, 1981, OPM determined that Mr. Brister was not eligible for disability retirement. He was directed to return to his former position on December 7, 1981. Mr. Brister submitted a claim for backpay from April 21, 1980 through December 4, 1981, 20 percent interest on the backpay, and restoration of 614 hours of annual leave and 602 hours of sick leave. Our Claims Group denied Mr. Brister's claim for the period prior to OPM's denial of the disability retirement application because the medical findings upon which the officials at Fort Polk based their decision to place him on leave were sufficient to support that decision and were not overturned by OPM. However, our Claims Group directed the Department of the Army to pay Mr. Brister backpay (without interest) and to restore his leave for the period subsequent to OPM's determination to deny his disability retirement, finding that the Department was required at that point to either return Mr. Brister to duty or initiate separation on the grounds of disability.

FACTS

Mr. Brister was employed at Fort Polk as a Heavy Mobile Equipment Mechanic when he submitted to his supervisors the following statement, dated July 30, 1979, from his physician, Dr. Albert E. Hensel, Jr.:

"This is to advise that Mr. Brister is presently under my care for perennial allergic rhinitis, asthma, pulmonary emphysema, obstructive, chronic and hearing impairment, mid and high frequencies, bilaterally.

"In view of Mr. Brister's allergic condition it is necessary that his environment be as well controlled as possible. Paint fumes are a known severe irritant to people with asthma and pulmonary emphysema. Therefore, this should be eliminated from his environment completely since in Mr. Brister's case it has proven to cause a flare of his respiratory allergy as well as nausea.

"We would appreciate your cooperating with our patient, and hope you might be able to move him to a job placement where his environment is more controlled with no exposure to paint fumes."

On August 1, 1979, Mr. Brister's supervisors requested a reassignment for him but on August 10, 1979, the Chief of the Employment and Services Branch reported that there were no positions available which would not expose him to fumes. Mr. Brister was scheduled for a fitness-for-duty examination and on December 18, 1979, the agency physician found that he could be retained but should be employed "away from dust, paint fumes and smoke." Officials again attempted to reassign Mr. Brister but the Chief of the Employment and Services Branch stated on March 12, 1980, that there were no vacancies or anticipated vacancies for which he was qualified that would place him in an environment not containing dust, paint fumes or smoke. On April 18, 1980, after another unsuccessful search for positions free from dust, smoke and paint fumes, Mr. Brister was counseled by the Civilian Personnel Office (CPO) concerning disability retirement. He apparently declined to apply for disability retirement himself and, therefore, the CPO informed him that Fort Polk would file the application and he would be placed on sick leave pending a determination by OPM. Effective April 21, 1980, Mr. Brister was placed on sick leave and when that account was exhausted he was placed on annual leave. When his annual leave account was exhausted he was placed on leave without pay.

The agency filed an application for Mr. Brister's disability retirement on June 2, 1980, but the application was returned on October 29, 1980, due to certain procedural deficiencies. Those deficiencies were corrected and the application was returned to OPM on January 26, 1981. In connection with OPM's consideration of the disability retirement application, Mr. Brister was directed to undergo an additional medical examination. The physician who performed that examination, Dr. Tuncay Ertan, forwarded his findings to OPM in a letter dated June 15, 1981. By a letter dated August 10, 1981, OPM disallowed the agency's application for Mr. Brister's retirement on the grounds that it had not established the presence of a medical condition which had caused a deficiency in service. The OPM did not elaborate on its findings.

On August 9, 1981, Mr. Brister submitted a claim to the Department of Labor's Office of Workers' Compensation Programs seeking compensation from April 21, 1980. His claim was rejected on August 18, 1981, on the grounds that the disability for which the claim was made was not proximately caused by his employment.

The OPM made its determination regarding Mr. Brister's disability retirement on August 10, 1981, but it was not until December 7, 1981, that Mr. Brister actually returned to work. The agency states that this delay occurred because it had difficulty in obtaining the report of Dr. Tuncay Ertan, the physician who had examined Mr. Brister for OPM. The agency felt that it needed this report to determine its future course of action. After unsuccessful attempts to obtain the report from OPM and the doctor himself, the agency learned that Mr. Brister had received a copy and requested it from him on October 19, 1981. The agency received the report a few days later. In it, Dr. Ertan expressed his findings concerning Mr. Brister's respiratory condition, based upon his examination of Mr. Brister on June 3, 1981, as follows:

"IMPRESSION: Mr. Brister has multiple inhalant allergies with allergic rhinitis and allergic tracheobronchitis. He gives a history of bronchial asthma.

"At present these conditions have been fairly controlled with treatment by Al Hensel, M.D.

"His Pulmonary Function Studies show no evidence of respiratory impairment at the present time."

On October 19, 1981, the Civilian Personnel Officer at Fort Polk requested an update on the availability of mechanic positions in a clean environment from the Occupational Health Service (OHS). The OHS reported, on November 20, 1981, that no such positions existed and recommended that Mr. Brister be returned to duty in an Automotive Mechanic position if at all possible since those positions have no exposure to paint fumes and less exposure to other fumes and dust than the Heavy Mobile Equipment Mechanic's positions. No Automotive Mechanic positions proved to be available so Mr. Brister was directed to return to his former position on December 7, 1981.

Mr. Brister initially filed his claim for backpay and leave through Mr. Robert L. Taylor, President of Local R5-168, National Association of Government Employees (NAGE), who argued that it was discriminatory to place Mr. Brister on leave since the agency's basis for doing so--a physician's statement that he should be employed away from smoke, fumes or dust--should have applied to every employee. Mr. Taylor suggested that if smoke fumes or dust were in fact present, it would have been better to clean up the hazardous conditions than to remove Mr. Brister. He argued further that since Mr. Brister did not request any annual or sick leave or sign for any of the leave charged to him, he should have all leave restored to him. Mr. Taylor claimed that the agency's treatment of Mr. Brister was an unjustified and unwarranted action, entitling him to backpay.

The Fort Polk Deputy Post Commander denied Mr. Brister's claim stating that Mr. Brister's removal could not be considered discriminatory since he was the only employee who had presented medical evidence that the conditions in his work environment were a severe irritant to his condition--a finding confirmed by the doctor who performed the fitness-for-duty examination. Since there were no other positions to which Mr. Brister could be moved, the Post Commander pointed out, the agency was forced to place him on involuntary leave. That action, he continued, was in accord with OPM regulations allowing an agency to place an employee on leave without his consent, where failure to do so would be injurious to the employee. The Post Commander determined that no unjustified or unwarranted personnel action had occurred and, that as a result, Mr. Brister was not entitled to backpay.

Mr. Brister appealed this decision through Edward Murphy, an attorney with NAGE. Mr. Murphy presented several arguments in support of Mr. Brister's claim. He contended that Mr. Brister was ready to work throughout the time he was on leave and cited Kleinfelter v. United States, 318 F.2d 929 (Ct. Cl. 1963), and Seebach v. United States, 182 Ct. Cl. 342 (1968), for the proposition that employees placed in an involuntary leave status for medical reasons are entitled to recover lost compensation when it is shown that the employees were ready, willing and able to perform their duties and were not, in fact, medically incapacitated at the time they were placed on leave. Although Mr. Murphy

cited no specifics, he claimed that Mr. Brister was "resolute in his attempts to continue in his employment." He claimed further, that the medical evidence upon which the agency made its determination did not show that Mr. Brister was incapacitated but, rather, that he had a condition which was controlled by medication. He reported that Mr. Brister had submitted the letter from Dr. Hensel in order to prod the agency to create a safer working environment, and he contended that although Dr. Hensel had stated that paint fumes are a known irritant to people with Mr. Brister's condition and that those conditions should be eliminated to prevent a flare-up of his condition, Dr. Hensel had implied that Mr. Brister's condition was under control. He argued further that the result of the fitness-for-duty exam did not support the agency's finding of incapacity since the doctor who performed the exam recommended that Mr. Brister be retained in service. Although Mr. Murphy argued that the medical evidence did not show incapacitation, he asks why, if the agency regarded it as such, it took no action for several months.

Mr. Murphy's final argument on behalf of Mr. Brister concerned his return to work after OPM's determination on the disability retirement application. Mr. Murphy points out that the agency's delay in allowing him to return to work was improper since it had an obligation to return him to work after OPM's determination and the time limit for filing an appeal to that determination had passed. He questions the agency's action in returning Mr. Brister to the same position for which it had determined he was incapacitated, since there was no showing that his physical condition had changed during the period he was placed on involuntary leave. Although the agency apparently alleged that certain improvements had been made, Mr. Murphy states that one of the improvements was made in an area where Mr. Brister did not work and the other had been made before Mr. Brister had been placed on involuntary leave.

In summary, Mr. Murphy argued that the agency committed an unwarranted and unjustified personnel action when it placed Mr. Brister on involuntary leave because it based its decisions to do so upon medical evidence which did not show Mr. Brister's incapacity and because Mr. Brister was ready, willing and able to perform his job.

In response to these arguments our Claims Group, in its settlement, pointed out that although Dr. Hensel and Dr. Nugent never specifically found that Mr. Brister was incapacitated nor recommended separation, they did recommend that Mr. Brister be removed from his work environment for health reasons. Our Claims Group also pointed out that our Office has held that an employee's placement on involuntary leave constituted an unjustified or unwarranted personnel action only under circumstances where medical findings have been overturned or where there are no medical findings to support the administrative determination. Stating that Dr. Ertan's medical findings that Mr. Brister had no respiratory impairment did not invalidate the earlier medical findings nor the agency's reaction to them, our Claims Group held that the agency's action in placing Mr. Brister on involuntary leave was proper and in accordance with Federal Personnel Manual Supplement 831-1 S10-10a(6), which provides that an "agency on the basis of medical evidence may place an employee on leave with his or her consent, or without consent, when the circumstances are such that retention in an active duty status may * * * be * * * injurious to the employee * * *." As we stated earlier, however, our Claims Group held that once OPM had made its determination the agency had an obligation to either return Mr. Brister to duty or initiate his separation on the grounds of disability, and its failure to do so entitled Mr. Brister to backpay and restoration of leave for that period.

Mr. Brister has appealed this determination, without presenting further evidence or argument. We have thoroughly reviewed the evidence considered by our Claims Group and find no basis upon which to question its determination.

OPINION

The Back Pay Act of 1966, 5 U.S.C. § 5596 (1982), provides for backpay where an unjustified or unwarranted personnel action has resulted in the withdrawal or reduction of pay to an employee. However, we have held that an agency's placement of an employee on involuntary leave pending a decision by OPM on an agency-filed application for disability retirement, is not considered to constitute an unjustified or unwarranted personnel action so as to entitle the employee to backpay when the administrative officers determine, based upon competent medical evidence, that the

employee is incapacitated for the performance of assigned duties. See Isma B. Saloshin, B-205950, January 10, 1984, 63 Comp. Gen. 156, and decisions cited therein. Only where the medical findings have been overturned or where there were no medical findings to support the administrative determination has our Office held that the placement of an employee on involuntary leave constituted an unjustified or unwarranted personnel action. See Memphis Defense Depot, B-214631, August 24, 1984.

Despite Mr. Murphy's arguments to the contrary, we believe that it was reasonable for the officials at Fort Polk to take the medical evidence presented to them as indicating that Mr. Brister was incapacitated. In a letter which Mr. Brister voluntarily submitted, his own physician, Dr. Hensel, stated that paint fumes should be eliminated completely from his patient's working environment since they caused a flare-up of his respiratory allergy and nausea. We do not find the implication in Dr. Hensel's letter, as does Mr. Murphy, that Mr. Brister's condition was controlled even when in the presence of the fumes. Nor is there any indication in that letter that it was intended merely to support Mr. Brister's request that his working environment be made cleaner. There is no evidence in the record before us of other complaints on this subject from Mr. Brister, such as those alluded to by Mr. Murphy.

The physician who performed the fitness-for-duty exam confirmed Dr. Hensel's statements, recommending employment away from smoke, dust, and fumes. That the physician stated that Mr. Brister could be retained instead of recommending his separation does not invalidate the agency's finding that he was incapacitated for the performance of the duties of his own position. This is especially true in light of the evidence in the record of the agency's repeated efforts to find a position away from smoke, dust, and fumes, for which Mr. Brister was qualified.

Nor are the agency's findings invalidated by OPM's subsequent determination that Mr. Brister was ineligible for disability retirement since there is no indication that OPM found that the medical evidence the agency relied upon was not competent. In this connection we would like to point out that in the cases Mr. Murphy cites--Kleinfelter v. United States and Seebach v. United States, where the Court of Claims held that employees placed in an involuntary leave

status for medical reasons are entitled to recover lost compensation when it is shown that they were ready, willing and able to perform their duties and were not medically incapacitated at the time they were placed on leave, the Court viewed OPM's (then Civil Service Commission) determination that the employee was not totally disabled as a retroactive determination regarding the fitness-for-duty of the employee at the time he was placed on involuntary leave. We cannot say that OPM's determination in this case is an authoritative determination that Mr. Brister was not medically incapacitated at the time he was placed on leave. Without elaboration, OPM merely found that it had not been established that a medical condition caused a deficiency in service.

Thus, not only does OPM's determination fail to show that Mr. Brister was ready, willing and able to work, we have no evidence that he attempted to convince his agency that he was. Paragraph S8-5b(c)(2) of Federal Personnel Manual Supplement 990-2, Chapter 550, provides that an employee who wishes to return to duty after a period of leave may be required to provide appropriate medical documentation. And after the agency receives and reviews the medical documentation, refusal by the agency to permit the employee to return to duty is an unjustified and unwarranted personnel action if the medical documentation is sufficient for the agency to determine that the employee is able to return to duty without being a hazard to himself/herself, other persons, or Government property. We have no indication that Mr. Brister provided his agency with documentation of his ability to work, which is inconsistent with his position if, as he contends, the agency misinterpreted the original letter from Dr. Hensel as a statement of his incapacity rather than the intended plea for better working conditions.

We note that one of the issues Mr. Murphy raised on behalf of Mr. Brister was why, if the agency felt that the medical evidence showed Mr. Brister to be incapacitated for duty, it waited so long to act on that evidence and place him on leave. It appears that at least some of that time elapsed while the agency searched for alternate assignments for Mr. Brister. Additionally, the record indicates that Mr. Brister was moved to areas of his shop that were at

least somewhat less hazardous for part of that time. However, we do not need to examine this issue because Mr. Brister would not be entitled to relief because the agency's delay, even if it was excessive, did not cause him to lose any compensation. Our Claims Group did find that the agency's delay in taking any action subsequent to OPM's determination was improper and entitled Mr. Brister to back-pay and restoration of leave. We concur in that finding.

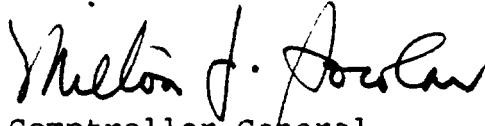
Mr. Murphy argued that the agency's placement of Mr. Brister in the same position shows that he was not incapacitated at the time he was removed. We do not agree. We believe it was reasonable for the agency to return him to his former position given that the physician who performed the OPM directed exam found no respiratory impairment in Mr. Brister at the time of that exam, and explicitly stated that Mr. Brister's condition was "fairly controlled with treatment by Al Hensel, M.D." Our decision in Landis B. Patterson, B-206544, July 7, 1982, involved similar facts. In that case we held that an employee who was placed on involuntary sick leave after a federal medical officer found that the employee had suffered a hearing loss and because the employee's job required work in a noise hazardous area, could not have his sick leave recredited. We held that subsequent testing, which showed that the employee's hearing was not permanently impaired and that he could be returned to his duties, did not invalidate the earlier findings.

Additionally, Mr. Murphy made the comment that he finds the connection between Mr. Brister's complaints and his placement on involuntary leave to be troubling. We have no evidence that would indicate Mr. Brister was placed on involuntary leave as a disciplinary measure. Such allegations, however, should be directed to the Special Counsel of the Merit Systems Protection Board.

Mr. Brister also seeks interest on any backpay award at the rate of 20 percent. Interest does not accrue against the United States unless it is specifically authorized by statute or contract. The Back Pay Act of 1966, 5 U.S.C. § 5596 (1982) does not authorize payment of interest. Van Winkle v. McLucas, 537 F.2d 246 (6th Cir. 1976), cert. denied, 429 U.S. 1093 (1977).

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For the reasons stated above, we are unable to agree that Mr. Brister is entitled to backpay and restoration of leave for the entire period of time he was on involuntary leave. We hereby affirm our Claims Group's determination.

for 
Comptroller General
of the United States